



Legal Update

September 2020

The SJC holds that the stop in this case was racially motivated and it revises some of the requirements that were previously established in Lora.

Commonwealth v. Long, SJC No. 12868 (2020): On November 28, 2017, around 11:00 AM, police observed the defendant, Edward Long, driving a Mercedes in the Clam Point section of Boston. Two Boston police officers who were assigned to the youth violence force strike and were in an unmarked cruiser on a side street saw the vehicle turn down a side street. Although the vehicle did not commit a traffic violation, the officers ran the license plate. The query revealed that the vehicle was registered to a female and that there was no current inspection sticker. The officers noticed that a male was the driver of the Mercedes.

The officers stopped the vehicle and discovered that the defendant did not have a driver's license, but a permit. One of the officers recognized the defendant's name and photograph from the gang unit's database. Further investigation confirmed that the defendant had a suspended license and two default warrants for operating without a license and failure to identify himself. The officers had the vehicle towed because they were concerned about vandalism, thefts and shootings in the area. One of the officers searched the vehicle prior to the tow and recovered a handgun inside of an open bag on the rear passenger seat. The defendant was charged when it was confirmed he did not have a license to carry.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

The defendant filed a motion to suppress and argued that the stop was impermissible because it was the result of selective enforcement of the traffic laws based on race and the inventory search was an unlawful search for investigatory purpose was the impoundment of the vehicle was not necessary. The motion was denied and the defendant further appealed.

Conclusion: The SJC concluded that the defendant presented more than adequate data to support his claim that the police racially profiled him when they ran a query of his license and the motion to suppress should have been allowed. Additionally, the SJC concluded that its prior decision in *Commonwealth v. Lora*, 451 Mass. 425 (2008), placed too great of an evidentiary burden on the defendants and the burden must be lowered in order to create a viable path for individuals to present and demonstrate their claims of racial profiling in in traffic stops.

1st Issue: Was the motor vehicle stop racially motivated?

The SJC reexamined the standard that it had previously established in *Lora*, in determining whether the stop was racially motivated. In *Lora*, the SJC held that the Equal Protection Clause of the Fourteenth Amendment and Article I Section 10 prohibit discriminatory application of impartial laws. If it can be shown that the laws are applied in a discriminatory manner, the evidence must be suppressed. At the time the SJC recognized that there is a plethora of potential traffic violations that most drivers are unable to avoid committing minor traffic violations on a routine basis, therefore allowing officers wide discretion in the enforcement of traffic laws. In an attempt to deter discriminatory policing, the SJC allowed defendants to present evidence that raises an inference that the stop was racially motivated. Unfortunately, the SJC assumed that the data regarding traffic tops made by individual police officers and the demographics of the individuals would be readily available to defendants, which was not the case.

The SJC established in *Lora* that the defendant has the initial burden of showing selective enforcement and to satisfy this burden the defendant must raise a reasonable inference that a broader class than those prosecuted has violated the law and that a failure to prosecute was either consistent or deliberate and that those not prosecuted was based on an impermissible classification. Once the defendant has met this burden, the Commonwealth must rebut that inference or suffer dismissal of the complaint. Statistics alone is not enough for the defendant to meet their burden of showing a discriminatory pattern. Rather statistical evidence maybe used to meet the defendant's initial burden of producing sufficient evidence to raise a reasonable inference of impermissible discrimination.

Based on the facts in this case, the defendant met the burden existing under the *Lora* standard. The officers stopped the defendant not from an observed traffic violation, but from a query of the license plate. Although there is no expectation of privacy in a license plate number on the exterior of the vehicle, *Commonwealth v. McCarthy*, 484 Mass. 493 (2020), a race-based **For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.**

decision to query the plate is not permissible and it a potential violation of the equal protection law.

The SJC revised the standard established in *Lora*. A defendant should first raise a reasonable inference of racial profiling through a motion to suppress. The motion should detail all the circumstances of the traffic stop.

1. The defendant need not submit admissible evidence; rather, the motion simply must point to specific facts about the stop that support such an inference. These facts, including statements by the defendant and others, may be based on the defendant's personal knowledge, the defendant's own investigation, evidence obtained during discovery, and other relevant sources.
2. If the defendant's motion establishes such an inference, the defendant is entitled to a hearing, at which the Commonwealth would bear the burden of rebutting the inference. Of course, a traffic stop motivated by race is unconstitutional, even if the officer also was motivated by the legitimate purpose of enforcing the traffic laws.

When examining the totality of the circumstances, factors the courts can consider are the following:

1. *patterns in enforcement actions by the particular police officer,*
2. *regular duties of the officer involved in the stop,*
3. *sequence of events prior to the stop,*
4. *manner of the stop,*
5. *safety interests in enforcing the motor vehicle violation, and*
6. *specific police department's policies and procedures regarding traffic stops.*

Once a reasonable inference of racial profiling has been established, the Commonwealth has the burden of rebutting that inference. If the Commonwealth fails rebut that the stop was motivated in part by race, the defendant would have to demonstrate that the stop violated the equal protection principles of arts. 1 and 10 and was illegal and the evidence would have to be suppressed.

Here, the SJC recognized that statistical data can be beneficial in supporting a defendant's claim for racial profiling. There are two components to the statistical data that defendants have used to establish a reasonable inference that the decision to conduct the traffic stop was motivated by race: (1) information about how the statute was enforced against other drivers of the defendant's race by the officers or department in question, often involving numbers of stops, citations, and FIOs for drivers of specific races (enforcement data); and (2) statistical data that estimate the

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

demographic distribution of drivers on the roads in the area of the stop (benchmark data). The two are then compared, under the assumption that, absent impermissible discrimination, the enforcement rates should reflect the demographic composition of all drivers. See *Lora*, 451 Mass. at 442. More specifically, the percentage of citations and FIOs involving Black drivers should have been similar to the estimated percentage of Black drivers on the road in the area of the stop. The defendant in this case obtained FIO reports issued by the officers who stopped him, for a period spanning from January 1, 2011, to November 28, 2017, the day of the stop; he also obtained citation data from December 14, 2011, to November 11, 2017. The defendant compared this data with the help of an expert who concluded that the officers in this case were significantly, more likely to conduct an FIO of a driver based on a motor vehicle infraction if the driver was Black than if the driver was not Black. The expert further concluded that there was strong statistical evidence that the officers issued citations to Black drivers in Boston at rates consistent with racial profiling. The judge determined that the evidence was insufficient to satisfy the initial burden to raise a reasonable inference of discrimination under *Lora*. The judge reasoned that the FIO and citation data presented were unreliable because not every traffic stop results in the production of an FIO report or the issuance of a citation.

The Commonwealth had an opportunity to rebut the data the defendant presented. The Commonwealth did not call an expert or present any statistical evidence and relied only on the officers' testimony that the stop was not conducted due to the defendant's race. The SJC concluded that the Commonwealth clearly failed to rebut the reasonable inference of impermissible discrimination raised by the defendant, and the denial of the motion to suppress must be reversed.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.